Supreme Court, U.S.
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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

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CARLOS OBREGON, LOURDES OBREGON,

Petitioners,

vs.

ALLSTATE INS. CO., JOHN L. SALYERS,

Respondents.

-oOo-

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

-oOo-

PETITION FOR WRIT OF CERTIORARI

-oOo-

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QUESTIONS PRESENTED FOR REVIEW

1. Whether district courts can invest themselves with subject matter jurisdiction, over the plaintiffs' objections, by dismissing all non-diverse defendants before final judgment.

2. Whether a circuit court can disregard (and thus ratify and affirm) the extra-jurisdictional actions of a district court, so long as those actions cause diversity jurisdiction to exist at the time final judgment is entered.

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STATEMENT OF JURISDICTION

Plaintiffs and Petitioners, CARLOS OBREGON and LOURDES OBREGON ("OBREGONS"), seek review of a decision of the United States Court of Appeals for the Ninth Circuit, entered on March 19, 1998. 28 U.S.C. § 1254 confers jurisdiction upon this Honorable Court to review this case by writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting

Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States, -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." (U.S. Const. Art. III, § 2, cl. 1.)

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a

controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." (28 U.S.C. § 1292(b).)

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between --

"(1) citizens of different States;

"(2) citizens of a State and citizens or subjects of a foreign state;

"(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

"(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

"For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for

permanent residence shall be deemed a citizen of the State in which such alien is domiciled." (28 U.S.C. § 1332(a).)

"Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." (28 U.S.C. § 1441(a).)

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." (28 U.S.C. § 1441(b).)

"A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case." (28 U.S.C. § 1447(c).)

STATEMENT OF THE CASE[1]

This is an action arising out of the Northridge earthquake of January 17, 1994. OBREGONS had an insurance policy with Defendant and Respondent, ALLSTATE INSURANCE COMPANY ("ALLSTATE"), which provided coverage for losses due to earthquake. [Clerk's Transcript {"CT"}, 1, 60; Excerpts of Record {"ER"}, 1: 3; 16: 88.] OBREGONS had a long-standing relationship with their insurance agent, Defendant and Respondent, JOHN L. SALYERS ("SALYERS"). [CT, 28; ER, 11: 50-51.]

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[1] In ruling on a motion to remand, the District Court must resolve "all disputed questions of fact in favor of the non-removing party." (Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42-43 (5th Cir. 1992); see also Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983).) Thus, where there is a dispute, OBREGONS set forth the facts as they alleged them to be.

On December 13, 1993, ALLSTATE notified OBREGONS that it would cancel their coverage on December 27 for non-payment of premium, unless ALLSTATE received a payment which it believed was past due. [CT, 60; ER, 16: 88.] Because OBREGONS believed they did not owe ALLSTATE any more money, OBREGONS telephoned SALYERS to ask about the cancellation notice. [CT, 10, 28, 60; ER, 6: 37-38; 11: 52-54, 56, 58, 62, 12: 64, 66-67; 13: 69; 16: 90.]

SALYERS told OBREGONS that they did owe ALLSTATE more money, but that there would be "no problem" with their insurance provided they paid the amount due by February 2, 1994. [CT, 1, 28, 60; ER, 1: 3-4; 11: 54-57; 12: 66; 16: 90-91.] He never told them that they no

longer had insurance coverage; had he done so, they would have paid the amount due immediately, instead of believing they had until February 2. [CT, 1, 28; ER, 1: 3-4; 11: 54-57, 59-60; 12: 67.] In fact, just two or three days before the earthquake, SALYERS specifically reassured OBREGONS that their insurance coverage was still in effect. [CT, 1; ER, 3: 25-28; 4: 1.]

OBREGONS paid ALLSTATE the amount due before February 2, 1994, and ALLSTATE accepted it. [CT, 23; ER, 9: 45.] However, in the interim, the Northridge earthquake occurred, severely damaging OBREGONS' home. [CT, 1, 16; ER, 1: 4; 16: 88.] OBREGONS filed a claim with ALLSTATE, but ALLSTATE denied the claim

in its entirety, stating that OBREGONS' coverage had lapsed. [CT, 1; ER, 1: 4.]

OBREGONS filed suit against ALLSTATE and SALYERS in the Superior Court of the State of California on January 17, 1995. [CT, 1; ER, 1: 1-16.] OBREGONS named ALLSTATE in their causes of action for breach of contract and bad faith. [CT, 1; ER, 1: 4-5.] OBREGONS named both ALLSTATE and SALYERS in their causes of action for breach of fiduciary duty and negligence. [CT, 1; ER, 1: 9, 12.]

ALLSTATE and SALYERS filed a general denial and 38 affirmative defenses. [CT, 1; ER, 2: 17-27.] A few days later, they removed the action to the United States District Court for the Central District of California. [CT, 1, 2; ER, 3: 28-33.] Respondents admitted that both OBREGONS

and SALYERS were residents of the State of California [CT, 1; ER, 3: 29.] Nevertheless, they contended that SALYERS was a "sham" defendant, against whom OBREGONS could state no claim as a matter of law. [CT, 1; ER, 3: 31-32.]

OBREGONS filed a timely motion to remand, contending that SALYERS was a viable defendant who destroyed diversity. [CT, 4; ER, 4: 34.] The District Court denied OBREGONS' motion. [CT, 11, 13; ER, 7: 39.] SALYERS subsequently moved for summary judgment in his favor, which the District Court granted based upon its previous order denying OBREGONS' to remand. [CT, 36, 43; ER, 14: 83-85.]

The case eventually went to trial on the issue of coverage, and judgment was entered against OBREGONS on September 20,

1996. [CT, 61; ER, 15: 86.] OBREGONS' timely appealed. [CT, 65; ER, 17: 96-97.] The chief issue on appeal was whether OBREGONS had waived any error in the District Court's denial of their motion to remand by failing to certify the case for an interlocutory appeal under 28 U.S.C. § 1292(b).

Respondents argued that, since the two parties remaining at final judgment were diverse, the federal court had jurisdiction regardless of any earlier errors. On March 19, 1998, the Court of Appeals for the Ninth Circuit agreed with Respondents, and affirmed.

The Ninth Circuit acknowledged that this Honorable Court had recently rejected the notion that a motion to remand is insufficient to preserve a

jurisdictional challenge for appeal. (Caterpillar, Inc. v. Lewis, 519 U.S. ___, 117 S.Ct. 467, 136 L.Ed.2d 437, 450 (1996).) The court nevertheless held that, since OBREGONS and ALLSTATE were diverse parties, and the only parties left at the end of the case after the District Court granted summary judgment in favor of SALYERS, even under Caterpillar the result was unchanged:

> "The judgment of the district court must stand since diversity of citizenship existed when final judgment was entered. [Citation.] Here, the district court denied remand and subsequently dismissed the non-diverse defendant on summary judgment

before the bench trial. Thus, even if the district court's denial of remand was improper, no jurisdictional defect remained at the entry of final judgment. [Citation.]"

The court held that OBREGONS could not complain on appeal of the District Court's previous lack of jurisdiction. The court expressly declined to consider whether the District Court's refusal to remand the case was in error.

JURISDICTION BELOW

Supreme Court Rule 14.1(i) requires OBREGONS to "show the basis for federal jurisdiction in the court of first instance." OBREGONS are unable to

comply, because the District Court had no jurisdiction over this dispute.

Respondents removed this case based on purported diversity of citizenship. (28 U.S.C. §§ 1332(a), 1441(b).) Both OBREGONS and SALYERS are residents of California, which precludes federal diversity jurisdiction. (Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); Pullman Co. v. Jenkins, 305 U.S. 534, 541 (1939).)

REASONS FOR WRIT REVIEW

Supreme Court Rule 10.1(c) provides that this Honorable Court will consider granting a petition for a writ of certiorari "When ... a United States court of appeals ... has decided a

federal question in a way that conflicts with applicable decisions of this Court." This Honorable Court's decision in Caterpillar overturned nearly twenty years of Ninth Circuit authority; however, the Ninth Circuit is reluctant to acknowledge that this Court's decision has any practical effect on it.

1. Pre-Caterpillar law

Until recently, there was a split among the appellate districts regarding whether plaintiffs waive any objection to removal by failing to seek an immediate appeal of the District Court's refusal to remand. For example, the Second Circuit holds that a motion to remand is sufficient to preserve the issue for appeal after trial and final judgment. (Guaranty Trust Co. of New York v.

McCabe, 250 F. 699, 701 (2d Cir. 1918); Gonsalves v. Amoco Shipping Co., 733 F.2d 1020, 1026, fn. 2 (2d Cir. 1984).) The Fourth Circuit, in contrast, required a plaintiff to seek an interlocutory appeal or waive the error. (Able v. Upjohn Co., 829 F.2d 1330, 1333-34 (4th Cir. 1987).)

The Ninth Circuit has consistently held that lack of diversity jurisdiction is waived if the aggrieved parties do not immediately seek an interlocutory appeal of the order denying their motion to remand. (See, e.g., Sheeran v. General Elec. Co., 593 F.2d 93 (1979); Lewis v. Time, Inc., 710 F.2d 549, 552-53 (9th Cir. 1983); Gould v. Mutual Life Ins. Co., 790 F.2d 769, 773-74 (9th Cir. 1986); Sorosky v. Burroughs Corp., 826 F.2d 794, 798-99 (9th Cir. 1987); Johnson

v. Mutual Ben. Life Ins. Co., 847 F.2d 600, 602 (9th Cir. 1988); Harris v. Provident Life & Acc. Ins. Co., 26 F.3d 930, 932-33 (9th Cir. 1994).)

In Sheeran, the plaintiffs timely moved to remand the action, but did not seek interlocutory review of the District Court's order denying their motion to remand. The Ninth Circuit concluded that, because the plaintiffs could have attempted to raise the issue earlier by interlocutory appeal but did not do so, "the appellants are precluded at this late date from raising the removal issue on appeal." (Sheeran at 98.)

In Lewis, a case involving a question of diversity jurisdiction, the Ninth Circuit held that the plaintiff had waived his right to challenge the

improper removal where "He did not seek interlocutory review of the denial of his motion to remand." (Lewis at 552.)

In Gould, the Ninth Circuit acknowledged that the District Court had erred in denying the plaintiff's motion to remand. (Gould at 774.) Nonetheless, the court affirmed, holding that, at least in the Ninth Circuit, "... the rule requires an appellant to have a remand issue certified for interlocutory review." (Id. at 774.)

In Sorosky, the Ninth Circuit affirmed the requirement that a plaintiff seek an interlocutory appeal in order to preserve objection to removal. (Sorosky at 798.) The court rejected the plaintiff's argument that this Honorable Court had "implicitly" held "that a

litigant need not apply for an interlocutory appeal to preserve an attack on removal jurisdiction." (Id. at 799.)

2. Caterpillar

In December of 1996, this Honorable Court **expressly** held that plaintiffs such as OBREGONS need not apply for an interlocutory appeal to preserve an attack on removal jurisdiction. (Caterpillar Inc. v. Lewis, supra, 136 L.Ed.2d 437, 450.) Thus, the Ninth Circuit rule set forth in Gould and related cases is no longer valid.

In Caterpillar, the plaintiff filed suit in Kentucky state court against both a diverse defendant and a non-diverse defendant, but then settled with the non-diverse defendant. (136 L.Ed.2d at 444-

45.) The diverse defendant removed the action on the last possible day, but before the settlement was complete and the non-diverse defendant formally dismissed. (Id. at 445.)

The plaintiff objected to removal and moved to remand the case on the ground that the non-diverse defendant was still a party, but the District Court denied the motion. (Id. at 445.) The non-diverse defendant was eventually dismissed pursuant to the settlement, and the case proceeded to a trial and judgment in favor of the remaining defendant. (Id. at 445-46.)

On appeal, the Court of Appeals for the Sixth Circuit held that the District Court erred in denying the plaintiff's motion to remand the case to the state

court for lack of subject matter jurisdiction. (Id. at 446.) This Honorable Court agreed with this conclusion. (Id. at 447-48.)

The sole question before this Honorable Court was: "Does the District Court's initial misjudgment still burden and run with the case, or is it overcome by the eventual dismissal of the non-diverse defendant?" (Id. at 448.) This Court squarely held that the plaintiff had not lost his right to challenge the removal on appeal:

> "And Lewis, by timely moving for remand, did all that was required to preserve his objection to removal. An order denying a motion to remand, 'standing alone,' is

'[o]bviously ... not final and [immediately] appealable' as of right. [Citation.] Nor is a plaintiff required to seek permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) in order to avoid waiving whatever ultimate appeal right he may have." (Id. at 450.)

This Honorable Court expressly rejected the very argument which Respondents advanced here, and expressly disapproved the practice of those circuits which, like the Ninth Circuit, would have required plaintiffs to seek interlocutory review in order to preserve objections to removal:

"On brief, Caterpillar argued that 'Lewis effectively waived his objection to removal by failing to seek an immediate appeal of the district court's refusal to remand.' [Citation.] We reject this waiver argument, though we recognize that it has attracted some support in Court of Appeals opinions. [Citation.]" (Id. at 450, fn. 11.)

In fact, this Honorable Court expressly criticized the practice:

"Routine resort to § 1292(b) requests would hardly comport with Congress' design to reserve interlocutory review for 'exceptional' cases while

generally retaining for the federal courts a firm final judgment rule. [Citations.]" (Id. at 450.)

3. **The Ninth Circuit's interpretation of Caterpillar**

In the instant case, when Respondents improperly removed the action to federal court, OBREGONS promptly moved to remand, pointing out that the court lacked subject matter jurisdiction. [CT, 4; ER, 4: 34.] Even after the District Court denied their motion, OBREGONS renewed their objection in opposition to SALYERS's motion for summary judgment. [CT, 28; ER, 10: 47-48.] The District Court never acquired subject matter jurisdiction over this dispute, and could not create its own jurisdiction by

disposing of the non-diverse party by way of summary judgment.

The Ninth Circuit, however, gave the decision of this Honorable Court in Caterpillar a different interpretation. There the plaintiff voluntarily settled with the only non-diverse defendant while the action was still in state court. (136 L.Ed.2d at 444-45.) Thus, the action truly was one between diverse parties from the time of settlement through final judgment. (Id. at 451-52.)

The particular facts in Caterpillar were such that, if this Honorable Court had remanded the action to state court, it would have remained one between parties of different states, in a posture procedurally and substantively identical to that before the federal court. There

would thus have been two identical trials between the same identical diverse parties, simply because the non-diverse party, whom the plaintiff voluntarily eliminated through settlement, did not leave the case fast enough.

Given the circumstances of the case, this Honorable Court declined to waste judicial resources by "return[ing] to state court a case now satisfying all federal jurisdictional requirements ... ." (Id. at 452.[2]) Instead, this Court held: "Once a diversity case has been tried in federal

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[2]The facts in Caterpillar differ from the instant case in an important respect. On remand to state court this case will not be in the same procedural posture as at final judgment. Instead, SALYERS will once more be a proper defendant, as he should have been all along. In Caterpillar, the plaintiff had settled with the non-diverse defendant, so that defendant would never again be a party and diversity would remain even if the case were remanded. Such is not the situation here. Because OBREGONS have a valid claim against SALYERS, this is not "a case now satisfying all federal jurisdictional requirements."

court ... considerations of finality, efficiency and economy became become overwhelming." (Id. at 451.)

> "To permit a case in which there is complete diversity throughout trial to proceed to judgment and then cancel the effect of that judgment and relegate the parties to a new trial in a state court because of a brief lack of complete diversity at the beginning of the case would be a waste of judicial resources." (Id. at 451-52, quoting Knop v. McMahan, 872 F.2d 1132, 1139, fn. 16 (3d Cir. 1989).)

The Ninth Circuit has seized upon this language to hold that, whenever the

non-diverse defendants are eliminated from the lawsuit prior to final judgment, by whatever means, the plaintiff cannot complain of the lack of subject matter jurisdiction because only diverse parties remain at final judgment. In other words, the Ninth Circuit rule remains exactly as it was before Caterpillar: if plaintiffs do not seek interlocutory appellate review of orders denying motions to remand, they lose their right to challenge the removal on appeal.

The Ninth Circuit's position is directly contrary to this Honorable Court's express holding in Caterpillar, essentially treating it as mere *dictum*. This Court's holding was not gratuitous. It is improper for circuit courts to ignore defects in subject matter

jurisdiction where the plaintiffs timely move for remand and preserve the issue -- even if the district court has taken it upon itself to dismiss all of the non-diverse defendants in the interim.

The Ninth Circuit's position is also contrary to principles which this Honorable Court laid down long ago, in the cases which this Court discussed in Caterpillar: a district court cannot confer subject matter jurisdiction upon itself where none exists by the expediency of entering judgment in favor of all non-diverse defendants. (See Grubbs v. General Electric Credit Corp., 405 U.S. 699, 704, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972); American Fire & Casualty Co. v. Finn, 341 U.S. 6, 16-17, 71 S.Ct. 534, 95 L.Ed. 702 (1951)

["Finn"].) To permit district courts to do so would "work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them." (Finn at 18.)

Notwithstanding these holdings, the Ninth Circuit apparently intends to continue its improper practice of determining jurisdiction by considering only the case's posture at final judgment, ignoring the jurisdictional defects and errors which led to the judgment. Since it appears that the Ninth Circuit will not voluntarily follow Caterpillar without more explicit direction from this Honorable Court, OBREGONS respectfully pray that this Court grant certiorari.

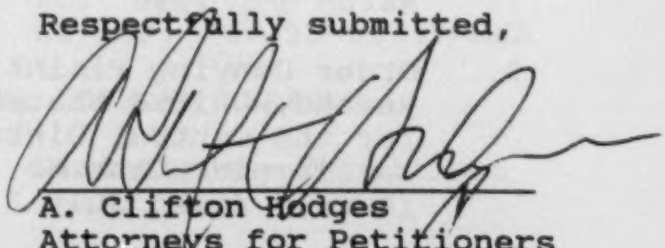
CONCLUSION

"Nothing is to be more jealously guarded by a court than its jurisdiction. Jurisdiction is what its power rests upon. Without jurisdiction it is nothing." (Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group, 823 F.2d 302 (9th Cir. 1987).)

For all the foregoing reasons, OBREGONS respectfully request that this Court grant this petition for a writ of certiorari, to end the practice of district courts improperly investing themselves with jurisdiction, in accordance both with the limits which

Congress has placed upon federal diversity jurisdiction, and with this Court's discussion of those limits in Caterpillar, Inc. v. Lewis.

Respectfully submitted,

By: 

A. Clifton Hodges
Attorneys for Petitioners
CARLOS and LOURDES OBREGON
DATED: August 19, 1998

APPENDIX

1. Judgment, United States Court of Appeals for the Ninth Circuit, Case No. 96-56649, filed and entered March 19, 1998

2. Memorandum Opinion, United States Court of Appeals for the Ninth Circuit, Case No. 96-56649, filed March 19, 1998

3. Order Denying Plaintiffs' Motion to Remand, United States District Court for the Central District of California, Case No. 95-2539 RG (RMCx), filed July 3, 1995

4. Memorandum of Opinion, United States District Court for the Central District of California, Case No. 95-2539 KMW (RMCx), filed June 18, 1996

5. Judgment, United States District Court for the Central District of California, Case No. 95-2539 (RNB), filed September 17, 1996

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-56649
CT/AG#: CV-95-02539-RNB

CARLOS OBREGON; LOURDES OBREGON

Plaintiffs - Appellants

v.

ALLSTATE INSURANCE COMPANY; JOHN L. SALYERS

Defendants - Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the

Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED

Filed and entered March 19, 1998

NOT FOR PUBLICATION*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS OBREGON and LOURDES OBREGON,	)	
Plaintiffs-Appellants,	)	NO. 96-56649
v.	)	D.C. NO. CV-95-2539-RBN
ALLSTATE INSURANCE COMPANY, a Corporation; and JOHN L. SALYERS, an individual,	)	MEMORANDUM
Defendants-Appellees.	)	

Appeal from the United States
District Court for the Central
District of California
Robert N. Block, Judge, Presiding

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Argued and Submitted December 3, 1997
Pasadena, California

Before: SCHROEDER and KOZINSKI, Circuit Judges, and WHYTE,** District Judge.

Carlos and Lourdes Obregon, the holders of an Allstate homeowners' insurance policy, appeal the judgment entered after the district court granted partial summary judgment in favor of Allstate agent John L. Salyers and found in favor of Allstate Insurance Company following a bench trial. The Obregons claim that the district court erred in not remanding the case to state court because Salyers was a non-diverse party. Therefore, they claim that the district court lacked subject matter jurisdiction

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**Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

and consequently its judgment must be reversed with direction to the district court to remand the action to state court.

The judgment of the district court must stand since diversity of citizenship existed when final judgment was entered. Caterpillar Inc. v. Lewis, 117 S.Ct. 467, 471 (1996). Here, the district court denied remand and subsequently dismissed the non-diverse defendant on summary judgment before the bench trial. Thus, even if the district court's denial of remand was improper, no jurisdictional defect remained at the entry of final judgment. Caterpillar, 117 S. Ct. at 477.[1]

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[1]After the claim against Salyers was dismissed on summary judgment, the Obregons proceeded to trial against Allstate based upon Salyers' alleged misrepresentations. The court found that Salyers did not make any false representations to, or conceal any facts

The Obregons distinguish Caterpillar, reasoning that the Obregons contested the dismissal of the non-diverse defendant. The Obregons point out that in Caterpillar a settlement between the plaintiff and the non-diverse defendant led to the dismissal of the non-diverse defendant. The Obregons also assert that the district court was without jurisdiction when it dismissed the non-diverse defendant. Caterpillar does not appear, however, to be limited to cases in which the non-diverse defendant has been voluntarily dismissed prior to final judgment.

The trial court properly granted summary judgment in favor of Salyers. Under California law, an agent acting on behalf of a fully disclosed insurer principal cannot be held personally

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from, the Obregons.

liable to the insureds for his negligence. See Lippert v. Bailey, 241 Cal. App. 2d 376, 382-83 (1996); Gasnik v. State Farm Ins. Co., 825 F. Supp. 245 249 (E.D.Cal.1992).

The Obregons attempt to limit Lippert and Gasnik to their facts. They argue that the two cases only stand for the proposition that an insurance agent may not be held personally liable for failing to procure desired insurance coverage for an insured and do not apply to the instant case since Salyers allegedly misrepresented that the Obregons had earthquake coverage and would continue to enjoy such coverage as long as they paid an outstanding premium by a certain date. However, we do not find the Obregons' attempt to limit Lippert and Gasnik persuasive.

The Obregons also contend that after the motion to remand was denied, Allstate argued that Salyers' alleged misrepresentations as to the existence of coverage were beyond the scope of his authority and not attributable to Allstate. ER 8: 41-42. However, the cited passage indicates that Allstate merely argued that Salyers' alleged misrepresentations could not modify the terms of the underlying insurance contract. Allstate did not argue that it could not be held vicariously liable for Salyers' negligence.

The Obregons further contend that a question of fact remains as to whether Salyers is liable under a "dual agent" theory. Under California law, an insurance agent may be an agent for both the insurer and the insured. See Troost v. Estate of DeBoer, 155 Cal. App. 3d 289

(1984); Maloney v. Rhode Island Insurance Co., 115 Cal. App. 2d 238, 244 (1953); Lippert, 241 Cal. App. 2d at 383. However, plaintiffs' "dual agent" theory requires that the insurance agent act on behalf of the insurer. An insurance agent is not a "dual agent" unless he is either an independent broker or has a long-term, special relationship with the insured. See Maloney, 115 Cal. App. 2d at 239, 244 (1953)(independent broker may be agent of both insurer and insured); Kurtz, Richardson, Wilson & Co. v. Insurance Communicators Marketing Corp., 12 Cal. App. 4th 1249, 1255, 1257-58 (1993)(dual agency relationship found where independent broker was contacted by plaintiff in order to procure insurance coverage).

Although the issue of agency is ordinarily a question of fact, the

determination becomes a question of law when the facts are undisputed. Troost, 155 Cal. App. 3d at 299; Magnecomp Corp. v. Athene Co., 209 Cal. App. 3d 526, 536 (1989). Here, the trial court appropriately resolved Salyers' liability on summary judgment. Although the Obregons allege that Salyers was acting as their agent, no evidence supports this allegation. It is undisputed that Salyers was an exclusive or "captive agent" of Allstate. No evidence of record suggests that Salyers acted as the Obregons' broker or that Salyers had a long term, special relationship with the Obregons.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS OBREGON and LOURDES OBREGON,	)	Case No. 95-2539 RG (RMCx)
Plaintiffs,	)	ORDER DENYING PLAINTIFFS' MOTION TO REMAND
vs.	)	
ALLSTATE INSURANCE COMPANY, a corporation; JOHN L. SALYERS, an individual; and Does 1 through 100, inclusive,	)	(Filed July 3, 1995)
Defendants.	)	

On June 26, 1995 the motion of plaintiffs Carlos Obregon and Lourdes

Obregon to remand this case to state court came on regularly for hearing before the Honorable Manual L. Real, Chief United States District Judge. The Court having read and considered the papers filed by the parties, having heard oral argument, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiffs' motion to remand this case to state court is denied.

DATED: July 3, 1995. /s/ Real
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS OBREGON and LOURDES OBREGON,	)	Case No. 95-2539 RG (RMCx)
Plaintiffs,	)	MEMORANDUM OF OPINION
vs.	)	
ALLSTATE INSURANCE COMPANY, et al.,	)	(Filed June 18, 1996)
Defendants.	)	

On March 4, 1996 the motion for summary judgment or, in the alternative, for partial summary judgment filed by

defendants Allstate Insurance Company ("Allstate") and John L. Salyers (collectively, "defendants") came on regularly for hearing before the Court. Defendants appeared by their attorneys of record, Luce, Forward, Hamilton & Scripps by Robert H. Roe, Esq. Plaintiffs Carlos Obregon and Lourdes Obregon (collectively, "plaintiffs") appeared by their attorneys of record, Taylor & Hodges by Michael Preis, Esq. Based upon all briefs, exhibits, declarations, and other evidence submitted by the parties, the oral argument of counsel, as well as all files and records in this case, the Court hereby **DENIES** defendants' motion for summary judgment, and **GRANTS** in part and **DENIES** in part defendants'

alternative motion for partial summary judgment.

I. BACKGROUND

In this action, plaintiffs seek benefits under an Allstate insurance policy for damage to rental property caused by the January 17, 1994 Northridge earthquake.

On or about May 2, 1993, Allstate, through its insurance agent Salyers, issued Allstate Fire Policy No. 0 37 110999 ("the policy") to plaintiffs. The policy expressly provides coverage for damage caused by earthquake.

In October 1993, plaintiffs ceased making premium payments under the policy. The last monthly premium payment made by plaintiffs in 1993 was received by Allstate on October 26, 1993. Lang Decl.

¶ 2. On December 13, 1993, allstate mailed a Notice of Cancellation to plaintiffs, stating that coverage under the policy would stop on December 27, 1993, unless Allstate received the past due amount shown on the notice by that date. Lang Decl. ¶ 3; Defendants' Exs. 101 and 102. No further payments were received by Allstate prior to December 27, 1993 deadline. Lang Decl. ¶ 2.

According to plaintiffs, Mrs. Obregon was responsible for paying the family's bills, including monthly premiums for the policy. Defendants' Ex. 105; L. Obregon Depo. at 13:8-13. During her deposition, Mrs. Obregon admitted receiving allstate's cancellation notice prior to the January 17, 1996 earthquake. *Id.* at 20:7-21:7. After receiving such

notice, Mrs. Obregon allegedly told her husband that she had received something from Allstate indicating that they were behind in their payments, but she did not tell him that coverage under the Allstate policy might be cancelled due to nonpayment of premiums. Defendants' Ex. 106; C. Obregon Depo. at 20:24-21:8, 24:6-11.

In early January 1993, prior to the earthquake, Mr. Obregon purportedly telephoned Salyers to discuss what she believed were problems with Allstate's billings. Defendants' Ex. 106; C. Obregon Depo. at 18:20-19:2. According to Mr. Obregon, Salyers stated that there was nothing wrong with the billing but that plaintiffs were behind on their payments. *Id.* at 19:3-8. Mr. Obregon

allegedly asked Salyers if plaintiffs were covered, and Salyers responded, "As long as we receive the payment before February 2, you will be covered." *Id.* at 19:9-11. Salyers never expressly said that the policy would be retroactively applied, nor did Salyers state that the policy was no longer in effect. *Id.* at 21:19-21, 22:16-20, 24:2-3.

Some time after this telephone conversation, plaintiffs paid the outstanding balance due on the policy. Mrs. Obregon cannot recall whether she sent a check to Allstate before or after the January 17, 1994 Northridge earthquake, but she believes the check was sent after the earthquake. Defendants' Ex. 105; L. Obregon Depo. 15:7-11, 37:9-21. Allstate received

plaintiffs' check on January 24, 1994. Lang Decl. ¶ 5. Following its standard practice, Allstate reinstated plaintiffs' coverage under the policy, effective January 22, 1994. *Id.*

After the January 17, 1996 earthquake, plaintiffs notified Allstate that their property had been damaged and sought recovery under the policy. In February 1993, Allstate investigated plaintiffs' claim and concluded that plaintiffs' policy had lapsed between December 27, 1993, and January 22, 1994, and that the policy was therefore not in effect on the date of loss. Hodges Decl., Exs. 6-8. By letter dated February 23, 1994, Allstate denied plaintiffs' claim. Hodges Decl., Ex. 8.

On January 17, 1995, Plaintiffs filed a complaint against Allstate and Salyers in the Los Angeles County Superior Court (Case No. BC 119997). The complaint sets forth four causes of action as follows:

1) Breach of Contract against Allstate;

2) Breach of the Implied Covenant of Good Faith and Fair Dealing against Allstate;

3) Breach of Fiduciary Duty against all defendants; and

4) Professional Negligence against all defendants.

The complaint seeks general, special and punitive damages, as well as attorneys' fees, according to proof. Complaint at 15-16.

On April 18, 1995, defendants removed the case to this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446, based on diversity of citizenship between plaintiffs and Allstate. The Notice of Removal states that the citizenship of defendant Salyers should be disregarded for jurisdictional purposes because Salyers is a "sham" defendant, named solely for the purpose of defeating federal jurisdiction. Notice of Removal at 4-5.

On May 19, 1995, plaintiffs filed a motion to remand. In their moving papers, plaintiffs asserted that the case should be remanded to state court because plaintiffs had stated viable claims against defendant Salyers, and Salyers' California citizenship defeated diversity

jurisdiction and rendered removal improper. On June 26, 1995, this Court, the Honorable Manuel L. Real presiding, denied the motion to remand.

On January 22, 1996, defendants filed a motion for summary judgment or, in the alternative, for partial summary judgment. This motion is now before the Court.

II. ANALYSIS

A. Summary Judgment Standard.

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981

(1979). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). This means that, if the moving party has the burden of proof at trial, that party must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment ion that party's favor. *Fontenot v. Upjohn Co.*, 780 F.2d 1190,

1194 (5th Cir. 1986). Furthermore, the court must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In other words, the moving party does not have the burden to produce any evidence showing the absence of a genuine issue of material fact. *Id.* at 325. "Instead, . . . the burden on the moving party may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence

of evidence to support the nonmoving party's case." *Id.*

Once the moving party satisfies this initial burden, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading . . . [T]he adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322-23. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be

insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff." *Anderson*, 477 U.S. at 252. The evidance of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 248; *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9th Cir. 1955).

B. Defendants Motion for Summary Judgment as to Plaintiffs' First Cause of Action for Breach of Contract Is Denied.

According to defendants, because plaintiffs did not have any insurance coverage with Allstate on January 17, 1996, Allstate's failure to pay policy damages caused by the Northridge earthquake cannot, as a matter of law,

constitute a breach of contract. Memorandum at 7.

Preliminarily, the Court rejects plaintiffs' claim that, under California Insurance Code section 677, Allstate's Notice of Cancellation was invalid because it failed to advise plaintiffs of their right to request a written statement of the facts upon which the cancellation was based. Opposition at 3-4. The Notice of Cancellation plainly stated that plaintiffs' coverage would be cancelled "for nonpayment of premium." Defendants' Ex. 101. The Notice of Cancellation further stated the date upon which plaintiffs' coverage would cease and what steps needed to be taken to avoid cancellation. *Id.* Thus, the Notice of Cancellation complied with the

Insurance Code and was valid and a matter of law.[1]

The Court also rejects plaintiffs' assertion that Allstate somehow waived its right to cancel the policy by accepting plaintiffs' payment after the earthquake and reinstating the policy as of January 22, 1994. Opposition at 5. Under California law, "Waiver is the intentional relinquishment of a known right after knowledge of the facts. The burden...is on the party claiming a waiver of a right to prove it by clear

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[1]Insurance Code section 677 provides that all notices of cancellation shall state "(a) which of the grounds set forth in Section 676 is relied upon, and (b) that, upon written request of the named insured,...the insurer shall specify the reason for the cancellation *except where the reason is for nonpayment of premium and is so stated in the cancellation notice*." Cal. Ins. Code § 677 (emphasis added).

and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" *Waller v. Truck Ins. exchange, Inc.*, 11 Cal.4th 1, 31 (1995). Here, plaintiffs present no evidence whatsoever to indicate that Allstate knew of plaintiffs' loss or potential claim when it received plaintiffs' premium payment on January 24, 1995, and reinstated coverage under the policy.

Because the Notice of Cancellation was valid and plaintiffs' cannot establish waiver, plaintiffs' breach of contract claim depends entirely upon their assertion that defendants are estopped from denying coverage by Salyers' representation that as long as Allstate received payment by February 2,

1995, plaintiffs would be covered. Defendants attack plaintiffs' estoppel argument on several grounds. As will be discussed, genuine issues exist as to whether defendants are estopped from denying coverage under the policy. Thus, defendants' motion for summary judgment, and plaintiffs' alternative motion for partial summary judgment as to the first cause of action for breach of contract must be denied.

1. Interpretation of Salyers' Statements.

First, defendants argue that "the only logical interpretation" of Salyers' purported statement is that plaintiffs' coverage would be "reinstated" upon receipt of plaintiffs' premium payment. Memorandum at 8. The Court disagrees.

When considering a motion for summary judgment, the evidence of the nonmovants is to be believed, and all justifiable inferences are to drawn in their favor. *Anderson*, 477 U.S. at 252. Applying this standard to the instant case, genuine issues of material fact exist as to whether plaintiffs could reasonably interpret Salyers' statement to mean that, as long as payment was received on or before the specified date, the policy would remain in effect and cancellation would be avoided. Genuine issues also exist as to whether plaintiffs could reasonably interpret Salyers' statement to mean that, even if the policy had been cancelled in December, the policy was reactivated by plaintiffs' communication

with Salyers, as long as payment was made by February 2, 1995.

2. The Creation of Coverage Where None Exists.

Next, defendants contend that because the policy had already lapsed by the time plaintiffs spoke with Salyers, nothing Salyers might have said could have created new coverage absent Allstate's knowledge and approval. Memorandum at 9-10.

Under California law, an insurer may be estopped from asserting cancellation of a policy of insurance where the insured has been reasonably led to believe that payments made within a reasonable time would be acceptable. *Lincke v. Mutual Benefit Health & Accident*, 76 Cal.App. 2d 222, 226 (1946);

Page v. Washington Mutual Life Assn., 20 Cal.2d 234 (1942). As stated by the court in *Lincke:*

> [I]t is well settled that, when an insurance company, after knowledge of any default for which it might terminate a policy, enters into negotiations which recognize its continued validity, the right to claim a forfeiture for such default is waived; and a waiver may be implied from the acts of the parties."

Id. at 227.

In the instant case, genuine issues exist as to whether, after knowledge of plaintiffs' default, Allstate entered into negotiations with plaintiffs which recognized the continuing validity of the policy, and whether defendants' conduct reasonably led plaintiffs to believe that the policy would not lapse as long as

plaintiffs paid their premium by February 2, 1994.[2]

3. Salyers' Authority to Modify the Policy.

Next, Defendants assert that, as a matter of law, Salyers' did not have the authority to modify the policy and reinstate coverage without Allstate's consent. Memorandum at 10-11.

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[2]The cases cited by defendants are distinguishable. For example, in *Aetna Casualty & Surety Co. v. Richmond*, 76 Cal.App.3d 645, 652-53 (1977), the court held that an agent's statement that the policy holder was "fully covered" did not preclude an insurance company from denying coverage or risks that were expressly excluded by the policy. The court relied, in part, on the general rule that it is the duty of the insured to read his policy. *Aetna Casualty*, 76 Cal.App.3d at 652. In this case, however, the issue is not whether plaintiffs' damages fell within the coverage of an existing policy, but whether the policy was in effect at all. Moreover, Salyers' statements could have led plaintiffs to believe they were covered regardless whether they read the policy or the cancellation notice.

The powers of an agent for an insurance company are, as a general rule, governed by the general law of agency. *Cronin v. Coyle*, 6 Cal.App.2d 205, 212 (1935). The agent possesses such powers as have been conferred by the company or as third persons have a right to assume he possesses under the circumstances of the case. *Id.* In the absence of notice, actual or constructive, to the insured of any limitations on the agent's authority, a general agent may bind the company by any acts, agreements, or representation that are within the ordinary scope and limits of the insurance business entrusted to him, although they are in violation of private instructions or restrictions upon his authority. *Id.* at 213. As a rule, where an agent has power

to issue a policy in the first instance he has the power also to renew such policies, and, as a corollary proposition, he has power to extend the term of such policies. *Id.*; see also *Preiss v. American Indemnity Co.*, 220 Cal.App.3d 752, 761 (1990) (where principal knows that its agents holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability).

In this case, plaintiffs' evidence indicates that Salyers issued the policy to plaintiffs and provided service to them throughout its term. Hodges Decl., Ex 1; C. Obregon Depo. at 14:21-15:25. Allstate does not claim that it was unaware that Salyers held himself out as

authorized to extend the term of the policy or to reactivate the policy after cancellation. Moreover, there is nothing in the record to suggest that plaintiffs knew or should have known that Salyers was not authorized to alter or reactivate the policy. Thus, genuine issues exist as to whether plaintiffs could reasonably assume that Salyers had the authority to modify the policy and/or to reinstate coverage without Allstate's consent.

4. Justifiable reliance.

Defendants further argue that, as a matter of law, plaintiffs cannot establish that their reliance on Salyers' statements of continuing coverage were "justifiable" in light of their receipt of the Notice of Cancellation. Memorandum at 11-12. The Court

disagrees. Except in rare cases, the issue of justifiable reliance presents a question of fact. *Blankenheim v. E.F. Hutton & Co.*, 217 Cal.App.3d 1463, 1475 (1990). As already discussed, genuine issues exist as to whether plaintiffs' interpretation of Salyers' statements was reasonable, and as to whether plaintiffs were reasonable in believing that Salyers had the authority to modify the terms of the policy or to reinstate its coverage without Allstate's consent. Thus, the Court cannot conclude that plaintiffs' reliance on Salyers' alleged statements was unjustified as a matter of law.

5. Loss in Progress Rule.

Finally, defendants assert that plaintiffs' claim for contractual benefits is barred by the "loss in

progress." Under this rule, when a loss is "known" or "apparent" before a policy of insurance is issued, there is no coverage. Cal. Ins. Code § 250; *Prudential-LMI Commercial Insurance v. Superior Court*, 51 Cal. 3d 674, 695, n. 7 (1990). The flaw in this argument is apparent. Plaintiffs' loss was neither known nor apparent when Salyers allegedly assured them that as long as they paid their premium by February 2, 1995, they would be covered. Thus, the loss in progress rule does not apply.

Accordingly, the Court finds that genuine issues of material fact exist with respect to defendants' motion for partial summary judgment as to plaintiffs' first cause of action for breach of contract as against Allstate.

Defendants' motion for summary judgment, and defendants' motion for partial summary judgment on this claim are therefore denied.

C. Defendants Motion for Summary Judgment as to Plaintiffs Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing Is Granted.

Defendants also seek summary judgment as to plaintiffs' second cause of action for breach of the implied covenant of good faith and fair dealing. According to defendants, the existence of a genuine dispute as to whether Plaintiffs had earthquake coverage on

January 17, 1994, precludes Plaintiff's bad faith claim as a matter of law.[3]

An insurer is liable for breach of the implied covenant of good faith and fair dealing if it acted unreasonably in denying coverage. *Lunsford v. American Guarantee & Liability Insurance*, 18 F.3d 653, 656 (9th Cir. 1994). The insurer is obligated to give the interests of the insured at least as much consideration as it gives its own interests. *Othman v. Globe Indemnity Co.*, 759 F.2d 1458, 1464 (9th Cir. 1985), *overruled on other grounds*, 844 F.2d 602, 605 (1988).

A court can conclude as a matter of law that an insurer's denial of a claim

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[3]Because genuine issues exist as to plaintiffs' first claim for breach of contract, defendants' argument that there can be no bad faith absent a contract fails.

is not unreasonable, so long as there existed a genuine issue as to the insurer's liability. *Lunsford*, 18 F.3d at 656; *Franceschi v. American Motorists ins. Co.*, 852 F.2d 1217, 1220 (9th Cir. 1988). Once the insurer determines that a genuine dispute over coverage exists, it is under no further duty to investigate the claim. If the insurance company's conclusion is not so unreasonable as to be a mere pretext for further investigation, the insurer is not liable for bad faith based on its conduct in the investigation. *Brinderson-Newberg v. Pacific Erectors*, 9712 F.2d 272, 283 (9th Cir. 1992) *cert denied* 507 U.S. 914 (1993); *Allstate Insurance Company v. Madan*, 889 F.Supp. 374, 379 (C.D.Cal. 1995).

In this case, the undisputed evidence indicates that Allstate thoroughly investigated plaintiffs' claim and discovered information establishing a genuine issue of liability under the policy. Hodges Decl., Exs. 5-8. Defendants sent a cancellation notice to plaintiffs indicating that the policy would "stop" on December 27, 1993. Defendants' Ex. 101. Plaintiffs received this notice but failed to pay their overdue premium until at least mid-January 1994, and they "believe" the check was sent to Allstate after the January 17, 1994 earthquake. Defendants' Ex. 105; L. Obregon Depo. at 15:7-11; 20:7-21;7: 37:9-21. Defendants' received the check on January 24, 1994, and

reinstated coverage as of January 22, 1994. Lang Decl. ¶ 5.

In light of this evidence, which is not in dispute, the Court concludes that as a matter of law defendants' denial of plaintiffs' claim was not unreasonable. Thus, by denying plaintiffs' claim, Defendants did not act in bad faith, and they are entitled to partial summary judgment as to plaintiffs' second cause of action for breach of the implied covenant of good faith and fair dealing as against Allstate.

D. Defendants' Motion for Summary Judgment as to Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty Is Granted.

Defendants also seek summary judgment on plaintiffs' third claim for

breach of fiduciary duty, asserting that California law does not recognize a fiduciary relationship between an insurer and its insured.

Under California law, no fiduciary duty is created between insurers and their insured. *Henry v. Associated Indemnity Corp.*, 217 Cal.App.3d 1405, 1418 (1990) (affirming trial court's sustaining of a demurrer without leave to amend to insured's claim for breach of fiduciary duty);[4] see also *Love v. Fire Insurance Exchange*, 221 Cal.App.3d 1136, 1148 (1990) ("Unique obligations are

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[4]In *Henry*, the court stated that there is no support in case law, "other than dicta in a few Supreme Court cases, which would support" a claim of breach of fiduciary duty against an insurer. *Henry*, 217 Cal.App.3d at 1418. The *Henry* court cited the same cases that plaintiffs now claim support a claim of breach of fiduciary duty against defendants. *Id.*

imposed upon true fiduciaries which are not found in the insurance relationship"); *Almon v. State Farm Fire & Casualty Co.*, 724 F.Supp 765, 766 (S.D.Cal. 1989) (holding California law does not recognize an action for breach of fiduciary duty between an insured and an insurer); *Hassard, Bonnington, Roger, and Huber v. Home Ins. Co.*, 740 F.Supp. 789, 792 (S.D. Cal. 1990) (dismissing breach of fiduciary duty claim because "there is no fiduciary duty between an insurer and an insured"); *New Hampshire Insurance Company v. Foxfire, Inc.*, 820 F.Supp. 489, 497 (N.D.Cal.1993) (same). Likewise, a cause of action for breach of fiduciary duty does not exist against an insurer's agent. *See Henry*, 217 Cal.App.3d at 1419; *Bennett v. Allstate*

Ins. Co., 753 F.Supp. 299, 303 (N.D.Cal. 1990).

In this case, plaintiffs have presented no evidence that their relationship with defendants was anything other than an ordinary arms-length business relationship between the insured and the insurer and its agents. Accordingly, defendants are entitled to partial summary judgment as to plaintiffs' third claim for breach of fiduciary duty as against all defendants. *See Henry*, 217 Cal.App.3d at 1419.

E. Defendants' Motion for Summary Judgment as to Plaintiffs' Fourth Cause of Action for Professional Negligence Is Granted as to Defendant Salyers.

Defendants further assert that plaintiffs claim for professional negligence against Allstate also fails as a matter of law.

Under California law, an insurer may be held liable for the negligence of its agent acting within the scope of his agency. *Free v. Republic Insurance Co.*, 8 Cal.App.4th 1726 (1992); *Lippert v. Bailey*, 241 Cal.App.2d 376, 382 (1966). In *Free*, the court held that, although an insurer and its agent are not required to advise insureds regarding the sufficiency of their policies, once they elect to

respond to the insureds' inquiries, a special duty arises requiring them to use reasonable care. *Free*, 8 Cal.App.4th at 1729.

In the instant case, plaintiffs inquired of Salyers as to the status of their policy. Once Salyers elected to respond to plaintiffs' inquiry, a duty arose requiring him to use reasonable care. *Free*, 8 Cal.App.4th at 1729. A reasonable finder of fact could conclude that Salyers breached this duty by assuring plaintiffs that they would be covered for any loss incurred as long as they paid their premium by February 2, 1994. Thus, genuine issues of material fact exist as to whether Allstate may be held liable for Salyers' negligence.

With respect to Salyers, the Court already rejected plaintiffs' fourth cause of action for negligence when it denied plaintiffs' motion to remand. The Court's ruling was based upon the well established rule that an insurance agent may not be held personally liable for negligent acts within the scope of his agency. "Where an agent is duly constituted and names his principal and contracts in his name and does not exceed his authority, the principal is responsible and not the agent." *Lippert*, 241 Cal.App.2d at 382; *Gasnik v. State Farm Insurance Co.*, 825 F.Supp. 245, , 249 (E.D.Cal. 1992). Courts have imposed personal liability on an insurance agent only upon a showing of a "dual agency" - i.e. where the agent acted both as a

"broker" for the insureds and as an agent for the insurance company. *See e.g. Maloney v. Rhode Island Ins. Co.*, 115 Cal.App.2d 238, 244 (1953) (dual agency found where individual defendant was broker for plaintiff and agent for insurance company providing insurance to plaintiff); see also *Troost v. Estate of DeBoer*, 155 Cal.App.3d 289, 298 (1984) (same).

Here, although plaintiffs claim that the existence of a dual agency is a question of fact, they present no evidence whatsoever which would indicate that Salyers ever acted as their personal insurance broker. In fact, in their complaint, plaintiffs expressly allege that Salyers "is, and at all relevant times was, an individual acting as agent

for Allstate in the state of California." Complaint ¶ 3. Moreover, according to his sworn declaration submitted in opposition to plaintiffs' motion to remand, Salyers was at all times the exclusive or "captive" agent of Allstate and never acted as a broker for plaintiffs. Salyers Remand Decl. ¶¶ 1,2. Thus, contrary to plaintiffs' assertions, Salyers cannot be held personally liable for his negligence, and the Court's refusal to remand was proper.

For the reasons discussed, defendants motion for partial summary judgment as to plaintiffs' fourth claim for negligence is denied as to Allstate. The Court's previous finding that plaintiffs failed to state a claim against Salyers was correct, and the

Court is unwilling to revisit this issue or to remand at this time. Thus, defendants' motion for partial summary judgment as to plaintiffs' fourth claim for negligence is granted as to Salyers.

F. Defendants' Motion for Summary Judgment as to Plaintiffs' Claim for Punitive Damages Is Granted.

Finally, defendants seek summary judgment on plaintiffs claim for punitive damages. Having determined that plaintiffs may not proceed on their claim for breach of the covenant of good faith and fair dealing, plaintiff's claim for punitive damage must fail. *See Franceschi*, 852 F.2d at 1220; *Madan*, 889 F. Supp. at 382. Plaintiffs only remaining claims are for breach of contract and negligence against Allstate.

Punitive damages are not available for either of these claims, and allowing plaintiffs to conduct additional discovery would not alter this fact.

III. CONCLUSION

Based on the foregoing, the Court hereby **ORDERS** as follows:

1. Defendants' motion for summary judgment is **DENIED**;

2. Defendants' alternative motion for partial summary judgment is **DENIED** with respect to plaintiffs' first cause of action for breach of contract as against Allstate;

3. Defendants' alternative motion for partial summary judgment is **GRANTED** with respect to plaintiffs' second cause of action for breach of the implied

covenant of good faith and fair dealing as against Allstate;

4. Defendants' alternative motion for partial summary judgment is **GRANTED** with respect to Plaintiffs' third cause of action for breach of fiduciary duties as against all defendants;

5. Defendants' alternative motion for partial summary judgment is **DENIED** with respect to Plaintiffs' fourth cause of action for professional negligence as against Allstate and is **GRANTED** with respect to Plaintiffs' fourth cause for professional negligence as against Salyers;

6. Defendants' alternative motion for partial summary judgment is **GRANTED** with respect to plaintiffs' claim for punitive damages;

7. Defendant Salyers is hereby dismissed with prejudice from this entire action.

DATED: June 17, 1996.

/s/ Kim M. Wardlaw
KIM McLANE WARDLAW
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS OBREGON and LOURDES OBREGON,	)	Case No. 95-2539 RG (RMCx)
Plaintiffs,	)	JUDGMENT
vs.	)	(Filed September 17, 1996;
ALLSTATE INSURANCE COMPANY, et al.,	)	entered September 20, 1996)
Defendants.	)	
	)	THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

This action came on for trial before the Court, the Honorable Robert N. Block,

United States Magistrate Judge, presiding. The issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover from plaintiffs their taxable costs of action in accordance with 28 U.S.C. 1920 and Local Rule 16.

Dated: September 17, 1996

/s/ Robert N. Block
ROBERT N. BLOCK
UNITED STATES
MAGISTRATE JUDGE